

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

AMY JONES)	
Claimant)	
VS.)	
)	
DENNYS #8045)	Docket No. 1,049,009
Respondent)	
AND)	
)	
KANSAS RESTAURANT & HOSPITALITY ASSOCIATION SELF INSURANCE)	
Insurance Carrier)	

ORDER

Claimant appeals the February 5, 2010, preliminary hearing Order of Administrative Law Judge Thomas Klein (ALJ). Claimant was denied benefits after the ALJ determined that she had failed to prove that she suffered an accidental injury which arose out of and in the course of her employment with respondent.

Claimant appeared by her attorneys, R. Todd King and Gary K. Albin of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorneys, Vincent A. Burnett and Dallas L. Rakestraw of Wichita, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held February 4, 2010, with attachments; and the documents filed of record in this matter.

ISSUE

Did claimant suffer personal injury by accident which arose out of and in the course of her employment with respondent? Claimant alleges that she suffered a fall while working for respondent. Respondent contends claimant faked the fall in order to avoid having to undergo a urine test at the halfway house where claimant was staying after being convicted of forgery and on drug charges. The Order of the ALJ does not specifically find that claimant failed to prove that she suffered an accidental injury which arose out of and

in the course of her employment with respondent. The Order simply states, in its entirety, “[c]laimant’s request for benefits is denied”. Additionally, the application submitted to the Board lists the issue on appeal as “[c]ompensability - denial of benefits”.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant alleges that, on January 3, 2010, while working for respondent as a waitress, she suffered an accidental injury when she fell in respondent’s parking lot after going outside for a smoke break. Claimant testified that she slipped on ice while stepping off a curb and fell, injuring her back. Claimant was assisted by Susan Harris, claimant’s friend and co-worker. Ms. Harris advised respondent’s manager, Brandon Fewin, of the accident and called claimant’s boyfriend, who took claimant to the Wesley Medical Center emergency room. The medical reports from the emergency room indicated back pain with tingling into the right leg from a fall at work. The report also indicated a history of a fracture in the back/tailbone in the past.¹

On January 17, 2010, claimant appeared at the emergency room at Via Christi Regional Medical Center-St. Francis Campus. X-rays at that time displayed a compression deformity at T7 and a mild loss of the T8 vertebral body.² Claimant has not returned to work for respondent and remains as a resident at the State Connected Women’s House (the House), a halfway house for criminal offenders. Claimant was on probation and was a voluntary resident at the House having been convicted of forgery and drug use.

Claimant’s medical history contains information about injuries in 2004 when claimant fell from a chair and apparently dislocated her hip. She also suffered a prior fracture to her tailbone and injured her neck in a car wreck in 2005. Claimant testified that she was experiencing no problems prior to the accident on January 3, 2010.

At the preliminary hearing in this matter, a friend and co-worker of claimant, Susan Harris, testified regarding the events on the alleged date of accident. It is noted that Ms. Harris was the person who helped claimant after the fall in the parking lot, notified the manager of the fall, and called the House and left a message regarding claimant’s injury and the fact that claimant was going to the emergency room and would miss the meeting on Sunday, January 3, 2010. This meeting was a house meeting. At these meetings, they usually do urinalysis tests (UAs). At some point, Ms. Harris also talked to

¹ P.H. Trans., Cl. Ex. 1.

² P.H. Trans., Cl. Ex. 2.

an insurance adjuster about the accident, but a printout of that conversation is not in this record.

When Ms. Harris testified at the preliminary hearing, her testimony varied significantly from the testimony provided by claimant. Ms. Harris testified to a conspiracy generated between herself and claimant leading to the alleged injury. According to Ms. Harris, claimant was very concerned about the Sunday meeting on January 3, 2010, and the probability that a UA would be performed. Claimant told Ms. Harris that claimant had relapsed and used drugs two to three days before the meeting. Claimant also stated that she had relapsed several weeks before and had advised her probation officer of the incident and was given a second chance. Claimant feared that if she tested positive, she would be removed from the House and could end up going to jail for up to two years. The only way claimant could avoid the UA on Sunday at the meeting was if she was in the hospital. Claimant advised Ms. Harris that she had suffered compression fractures in her back from a previous accident. If she faked an injury, she could go to the hospital and x-rays would display the earlier fractures. Claimant could thus avoid the meeting and delay the UA for one to two more days. This would provide additional time for her urine to become clean and would assist claimant to pass the UA.

Ms. Harris testified that, on the alleged date of accident, claimant went into the parking lot and laid down in the snow and made a snow angel. Claimant then got up and claimant and Ms. Harris told claimant's supervisor of the alleged accident. Claimant was then taken to the emergency room by her boyfriend (claimant's boyfriend). Ms. Harris stated that she was willing to assist claimant to pass the UA. Ms. Harris had a history of drug use and had attended Narcotics Anonymous herself. However, Ms. Harris had been off probation for at least 12 years. When she realized that claimant was pursuing the workers compensation claim against respondent, Ms. Harris talked to her boyfriend (Ms. Harris' boyfriend) about the situation. Ms. Harris then decided to tell the truth in order to avoid a fraud being perpetrated on respondent. The prospect of workers compensation fraud apparently bothered Ms. Harris more than the UA situation.

Dorine Douglas Tucker-Bey was a home health care worker for Mercy, a home health care facility in Andover, Kansas. She also worked for a company called Parallax in its med room and detox department and was the house monitor for the House. As house monitor, she supervised claimant and the other individuals living in the House. Ms. Tucker-Bey testified that claimant had never tested positive from a UA test. She also stated that she had tested the entire house on January 1, 2010, and all tests were negative. She had only good things to say about claimant.

However, on cross-examination, Ms. Tucker-Bey acknowledged that claimant had contacted her about a feared relapse. Ms. Tucker-Bey was asked if claimant suffered a relapse and had come to her for assistance. Ms. Tucker-Bey acknowledged that claimant had requested the help and was sent to detox for a UA. Ms. Tucker-Bey stated that at that point, it was out of her hands. When asked whether claimant used drugs

or not, Ms. Tucker-Bey stated that she was not aware whether claimant used drugs or not. There was also some confusion as to whether the general UA test was on January 1, or on either December 30 or 31, 2009. Ms. Tucker-Bey did not have her test schedule to verify the exact dates of the UA tests. She did acknowledge that a test on Sunday, January 3, 2010, after the meeting was a possibility. The tests were very random, and the residents were never sure when the next test would occur.

The ALJ, in the Order, denied claimant's request for benefits, but no additional explanation was contained in the Order. However, it can be inferred that the ALJ found claimant had failed to prove that she suffered an accident which arose out of and in the course of her employment with respondent.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.³

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁴

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁵

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental

³ K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

⁴ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁵ K.S.A. 2009 Supp. 44-501(a).

injury and the employment. An injury arises “out of” employment if it arises out of the nature, conditions, obligations and incidents of the employment.”⁶

The Board has, on many occasions, given deference to the administrative law judge when attempting to determine the credibility of witness testimony, especially in situations such as this where the testimony of witnesses is so diametrical. The testimony of claimant and of Ms. Harris are in direct conflict with each other regarding the alleged accident. While the testimony of Ms. Tucker-Bey is somewhat supportive of claimant, it also verifies Ms. Harris’ claim that claimant had suffered an earlier relapse and was concerned about a possible UA on Sunday at the meeting. While Ms. Tucker-Bey testified that claimant had never tested positive, she also acknowledged that when claimant told her of a possible relapse, claimant was sent to detox and Ms. Tucker-Bey had no idea what happened thereafter.

This Board Member is bothered by the conflicting information provided by Ms. Harris to her supervisor and to the court. When faced with such conflict, the opportunity to observe witnesses testify is a valuable benefit. Here, the ALJ was present for the testimony of claimant, Ms. Harris and Ms. Tucker-Bey. In denying claimant benefits in this matter, it appears that he found claimant to be less than credible. This Board Member will not disturb that determination. Claimant’s request for benefits is denied.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has failed to prove that she suffered an accidental injury which arose out of and in the course of her employment with respondent. The denial of benefits in this matter is affirmed.

DECISION

⁶ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

⁷ K.S.A. 44-534a.

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Thomas Klein dated February 5, 2010, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April, 2010.

HONORABLE GARY M. KORTE

c: R. Todd King/Gary K. Albin, Attorney for Claimant
Vincent A. Burnett/Dallas L. Rakestraw, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge